Riesbeck Food Markets, Inc. *and* United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC. Cases 8–CA–21274 and 8–CA–22332

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, BROWNING, AND COHEN

On January 28, 1991, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs. The Respondent and the General Counsel filed answering briefs.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions, briefs, and supplemental briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith and to adopt the recommended Order as modified.[2]

The facts, fully set forth in the judge's decision, may be summarized as follows. On September 7, 1988, the United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC (the Union) commenced informational picketing and handbilling near the customer entrances of the Respondent's St. Clairsville, Ohio and Wheeling, West Virginia stores. The Union's picket signs and handbills stated that the Respondent did not employ union members or have a contract with the Union, and they asked customers not to patronize the Respondent. The Respondent's managers asked the pickets and handbillers to leave the premises. They refused. The Respondent thereafter obtained state court injunctions limiting the Union's activity to public property away from the Respondent's stores.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discriminatorily prohibiting the union representatives from engaging in informational picketing and handbilling near the customer entrances to the two stores. For the reasons set forth below, we agree with the judge. The judge further found that the Respondent did not violate the Act by filing and pursuing the state court civil actions seeking expulsion of the union pickets and handbillers from the Respondent's premises. For the reasons set forth below, we disagree with the judge and find that the Respondent did so violate the Act.

A. *The Respondent's Prohibition of Union Informational Picketing and Handbilling*

The Respondent maintains a lengthy written policy concerning the solicitation of its customers. It provides at the outset that the Respondent

> follows a general policy of prohibiting any solicitation of or distribution of materials to Riesbeck's customers by outside groups and individuals on Riesbeck's premises. The basis of this policy is that Riesbeck's will allow no solicitation or distribution activity on its premises that holds any significant potential of harming Riesbeck's business.

The policy specifically prohibits any solicitation involving a do-not-patronize message, political campaign, or any controversial issue. The policy further provides, however, that ''[l]imited access . . . to customers by charitable organizations under controlled conditions enhances Riesbeck's business goodwill in the communities it serves.'' The policy accordingly states that solicitation of and distribution to customers may be permitted by organizations that ''must be charitable in nature.'' The policy concludes by stating ''[n]otwithstanding the foregoing, Riesbeck's retains discretion to deny access to its premises to any individual or group whose activity does not, in Riesbeck's judgment, promote Riesbeck's business.''[3]

The Respondent does not dispute that it prohibited the Union's informational picketing and handbilling on its premises pursuant to its policy concerning the solicitation of customers. That policy explicitly limits the solicitation of customers only to that undertaken by charitable organizations.[4] It accordingly cannot be disputed that the Respondent's policy on its face discriminates against union solicitation of customers by permitting customer solicitation only by charitable organizations.

In addition, the judge found that the Respondent in fact applied its customer solicitation policy in a discriminatory manner. The judge observed that pursuant to its customer solicitation policy, the Respondent has permitted numerous organizations to solicit customers on its property at the two stores here in issue. For ex-

[1] On February 26, 1992, the National Labor Relations Board issued a notice to parties of opportunity to submit statements of position concerning the impact, if any, of the Supreme Court's decision in *Lechmere v. NLRB*, 112 S.Ct. 841 (1992), on the instant case. Thereafter, the Respondent, the Charging Party, and the General Counsel filed supplemental briefs.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent's policy is set forth in full in appendix B to this decision. Because the Respondent contends that the customer solicitation policy as implemented differs from the policy on its face, we shall use the term ''practice'' when referring to the former and the term ''policy'' when referring to the latter.

[4] The Respondent's policy provides, in pertinent part:

> [S]olicitation of and distribution to customers may be permitted under the following circumstances:
>
> a. The organization *must* be charitable in nature. [Emphasis added.]

ample, in 1988, the year in which the instant labor dispute occurred, the following groups were permitted by the Respondent to solicit customers in front of the Wheeling, West Virginia store for varied purposes: volunteer fire departments were permitted to conduct a bake sale and a candy sale; various youth sport groups and Easter Seals were permitted to solicit for tags; the V.F.W. was permitted to conduct poppy sales; and the Salvation Army was permitted to conduct its bell-ringing collection campaign throughout December. In total, during 1988, there were approximately 23 days of such solicitation activity excluding the month-long Salvation Army activity. With respect to the St. Clairsville, Ohio store, the Respondent's president testified that the list of groups and activities would be ''considerably longer.''

Based on this evidence, the judge correctly found that the Respondent ''permitted all kinds of civic and charitable solicitation for a total of almost two months a year.'' The Respondent's contention that its permission of solicitation by charitable and civic organizations constitutes a ''limited'' exception to its general prohibition against customer solicitation must fail in view of the overwhelming record evidence to the contrary. In these circumstances, the judge correctly concluded that, under well-established precedent, the Respondent's refusal to permit the instant union solicitation of customers via informational picketing and handbilling while permitting extensive civic and charitable solicitation was discriminatory and hence violative of Section 8(a)(1) of the Act. See, e.g., *St. Vincent's Hospital*, 265 NLRB 38, 40 (1982), enfd. in pertinent part 729 F.2d 730 (11th Cir. 1984). Indeed, as the judge noted, there are no ''legally significant differences'' between the instant case and two other cases in which 8(a)(1) violations had been found on the basis of unlawful disparate treatment of union activity. *Ordman's Park & Shop*, 292 NLRB 953 (1989); *D'Alessandro's, Inc.*, 292 NLRB 81 (1988). The Supreme Court's decision in *Lechmere* does not disturb the Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that ''an employer may validly post his property against nonemployee distribution of union literature if . . . [it] does not discriminate against the union by allowing other distribution.'' See *Great Scot, Inc.*, 309 NLRB 548 fn. 2 (1992). Compare *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (apparently agreeing with the Board that ''an employer will violate the Act if there is 'disparate treatment of protected union activity,''' but finding that it is ''not discriminatory'' for an employer to pay employees to distribute antiunion handbills ''while keeping others out''). But see *Davis Supermarkets*, 2 F.3d 1162, 1177 (D.C. Cir. 1993). (''Since the NLRA does not confer rights on nonemployees (including customers), neither the givers nor receivers of information are protected [where nonemployees seek access to communicate with customers.] This principle would *seem to* extend even to cases of alleged discriminatory denial of entry, so long as the people denied access are nonemployees and they seek to communicate with customers.'') [Emphasis added.] The *Davis* court enforced the Board's Order (306 NLRB 426, 426–427 (1992)) finding disparate treatment ''[b]ecause the Company denied access to . . . six employee pickets [who supported one union] while it permitted [another union's] representatives to enter the . . . store to organize employees.'' 2 F.3d at 1178.

The Respondent concedes in its exceptions, as it must, that its customer solicitation policy on its face limits solicitation to that undertaken only by charitable organizations. The Respondent nevertheless argues in its exceptions that its actual practice under the policy has been to permit organizations other than charitable ones ''to engage in distribution and solicitation which do not adversely affect the promotion of its business.'' The Respondent contends that its policy as implemented does not discriminate on the basis of the union or nonunion nature of the organization seeking to solicit its customers, but rather nondiscriminatorily ''permits or bans solicitation based on whether or not the activity adversely affects Riesbeck's business.'' In this connection, the Respondent claims that it is ''particularly noteworthy'' that in 1988 the Respondent permitted the Union access at the Wheeling, West Virginia store to engage in organizational employee solicitation because that activity did not ''adversely affect the promotion of Riesbeck's business.'' On the other hand, the Respondent prohibited the union activity at issue here because the Union ''requested that customers 'do not patronize' the stores, thereby adversely affecting Riesbeck's business.''

We are not persuaded by the Respondent's explanation that the actual practice under its customer solicitation policy is nondiscriminatory. Rather, we find that the Respondent's practice of reviewing and evaluating each message sought to be disseminated, and granting access only if in its judgment the solicitation does not adversely affect the Respondent's business is unlawfully discriminatory vis-a-vis union solicitation of customers.

The Supreme Court has declared that freedom of speech has long been a basic tenet of Federal labor policy. *Letter Carriers v. Austin*, 418 U.S. 264, 270 (1974). ''This freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'' Id. at 272. Indeed, the Court has explained that the enactment of Section 8(c) of the Act ''manifests a congressional intent to encourage free debate on issues dividing labor and management.'' *Linn v. Plant Guard Workers Local*

114, 383 U.S. 53 (1966).[5] The Board has accordingly recognized that Federal labor policy favors ''uninhibited, robust, and wide-open debate in labor disputes.'' *Franzia Bros. Winery*, 290 NLRB 927, 932 (1988), quoting *Letter Carriers v. Austin*, 418 U.S. at 270.

The Respondent's practice, based as it is on the content of the solicitation, cannot be reconciled with the robust debate that is protected under the NLRA. A practice that distinguishes among solicitation based on an employer's assessment of the message to be conveyed is discriminatory within the meaning of *Babcock & Wilcox* and its progeny, because in every instance the employer must specifically approve the solicitation of messages protected by the Act. Thus, the Respondent may under its practice permit the distribution on its property of a wide range of messages while at the same time forbidding the distribution of messages that are protected under the Act.

Indeed, that is precisely what occurred in this case. The Union's informational picketing and handbilling falls plainly within the second proviso to Section 8(b)(7)(C) of the Act, which provides that

> nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.[6]

Further, the Board has specifically held that a union's informational picketing with the message—as in this case—''Please Do Not Patronize . . . [Employer] Does Not Employ Members of, or Have a Contract with [the Union]'' is lawful activity under the second proviso to Section 8(b)(7)(C)[7] and is conduct protected by Section 7 of the Act. *D'Alessandro's, Inc.*, supra at 83. The Union was accordingly seeking to disseminate a protected message when it sought to inform the public that the Respondent does not employ union members, or have a contract with the Union, and asked customers not to patronize the Respondent.

Under the Respondent's practice, however, the Respondent forbade the Union's distribution of this protected message on its property based on its dislike of the nature of the message. The Respondent accordingly precluded the dissemination of a protected message on its property while permitting, as the judge found, ''all kinds of civic and charitable solicitation on its property for a total of almost two months a year.'' In these circumstances, it is difficult indeed to characterize the Respondent's practice as permitting on its property union solicitation of protected messages on an equal basis as it permits an overwhelming amount of other solicitation.

The discriminatory nature of the Respondent's practice is further evidenced by the discretion vested in the Respondent to ban or permit solicitation activity, including the lawful union consumer appeals involved here, based on the Respondent's purely subjective judgment whether the activity ''adversely affects'' its business. A practice based on this subjective standard amounts to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes. Under the Supreme Court's decision in *NLRB v Babcock & Wilcox*, supra at 112, the Board must ensure that an employer ''does not discriminate against the union by allowing other distribution.'' We would scarcely be discharging that responsibility if we countenanced a practice that treats all employer access decisions as purely a matter of subjective business judgment.[8]

In contending that its practice is nondiscriminatory with respect to union solicitation of customers, the Respondent confuses its application of an entirely subjective standard to both union and nonunion solicitation with the application of a truly neutral criterion that treats union solicitation and nonunion solicitation alike. It is true, as the Respondent submits, that it applies the same standard to both union and nonunion solicitation: solicitation is prohibited or permitted based on whether in the Respondent's judgment the solicitation adversely affects its business. As explained above, however, that standard is discriminatory vis-a-vis union customer solicitation because it vests the Respondent with unfet-

[5] Sec. 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[6] The Respondent concedes in its brief to the Board that the Union's ''picket sign uses language that brings the union within the protection of the proviso to Section 8(b)(7)(C).''

[7] *Retail Clerks Local 400 (Jumbo Food Stores)*, 136 NLRB 414, 417 (1962); *Hotel & Restaurant Employees (Crown Cafeteria)*, 135 NLRB 1183 (1962), supplementing 130 NLRB 570 (1961), enfd. 327 F.2d 351 (9th Cir. 1964) (picket signs stating ''Notice to Members of Organized Labor and their friends—This Establishment Is Non-Union—Please Do Not Patronize'' held to conform to the proviso).

[8] The dissent acknowledges at the outset that *Lechmere* ''did not eliminate what might be termed the 'discrimination' exception'' to the rule of *Babcock & Wilcox*. We agree and reiterate that the *Babcock & Wilcox* discrimination exception plainly prohibits an employer from discriminating against ''nonemployee distribution of union literature.'' We are simply holding that an employer cannot accomplish that discrimination by the simple expedient of giving itself so much discretion to define what is bad for its business that it effectively is able to prohibit all union solicitation directed at customers and the public, even though it allows other types of solicitation.

tered discretion to preclude the solicitation of protected messages by unions while permitting a myriad of other solicitation. It is of little significance that the standard does not explicitly forbid solicitation by unions, as the Respondent emphasizes, because the Respondent's practice permits it to exclude any union solicitation it wishes to without reference to such an express exclusion.

It is disingenuous for the Respondent to argue that in forbidding protected union messages it does not care for and considers bad for business, it acts in a nondiscriminatory fashion because it likewise forbids the solicitation on its property of nonunion related messages it does not care for and considers bad for business.[9] The Respondent is under no obligation to open up its property to nonunion messages that it finds distasteful, and it would be most surprising if any employer chose to do so. The prohibition of such messages does not grant the Respondent license to prohibit distribution of protected union messages on its property while allowing abundant charitable and civic solicitation. The Respondent may not discriminate against the Union by opening up its property to a wide range of solicitation that it deems ''enhanc[ing to its] business goodwill'' and forbidding—as here—the dissemination of messages protected by the Act which it deems bad for business.

In determining whether the Respondent's customer solicitation practice is discriminatory, we have carefully considered the fact that the Respondent granted the Union access on one occasion to engage in organizational employee solicitation. In the circumstances of this case, we find that this evidence is entitled to little weight. That the Respondent elected to permit in one instance union organizational solicitation is not probative as to whether the Respondent has discriminated against the distribution of protected union messages in subsequent instances. This is so because the Respondent in each instance makes a new subjective determination whether the solicitation is permissible and its prior decision is entirely separate from subsequent consideration of union solicitation. Furthermore, the Respondent concedes that its allowance of union organizational solicitation of employees did not implicate its policy at issue here concerning the solicitation of customers. The Respondent acknowledges that it has two ''independent'' solicitation policies: one involves the solicitation of customers and the other involves the solicitation of employees. The Respondent permitted the organizational solicitation pursuant to its policy regarding the solicitation of its employees, and the Respondent concedes that that policy is not involved in this case. Where, as here, an employer states that it has two independent policies and only one is in issue, we believe that it is appropriate to focus upon the policy that is challenged to be unlawful (solicitation of customers) and not attempt to evaluate conduct governed by a different policy that is not before us.[10]

In sum, finding the Respondent's customer solicitation policy to be discriminatory on its face and in its application, we conclude that the Respondent's denial of access to the Union to picket and handbill near the customer entrances to two of its stores constituted unlawful disparate treatment of union activities in violation of Section 8(a)(1).[11]

B. *The Respondent's State Court Actions Against the Union*

As noted above, the Respondent filed civil complaints in Ohio and West Virginia state courts seeking injunctive relief against the Union's picketing and handbilling activity. On September 9, 1988, the courts in each state issued temporary restraining orders prohibiting the Union's activity outside the Respondent's customer entrances and limiting the activity to public

[9] The Respondent submits, for example, that it forbade political campaign solicitation on its property because it is controversial and assertedly bad for business.

[10] We likewise observe that our dissenting colleagues fail to focus on the Respondent's policy that is at issue in this case: the Respondent's two-page policy regarding the solicitation of customers that is set forth in full in appendix B, and the Respondent's asserted practice under that policy of ''permit[ting] or ban[ning] solicitation based on whether or not the activity adversely affects Riesbeck's business.'' The dissent never addresses the question whether the Respondent discriminatorily applied that policy or practice. Rather, our colleagues extract one sentence—that prohibiting do-not-patronize messages—from the Respondent's two-page policy and examine that one sentence without reference to the Respondent's overall policy or stated practice. Our colleagues, accordingly, do not address the significance of the judge's finding that the Respondent permitted ''all kinds of civic and charitable solicitation'' under its policy and its practice while disallowing the instant union solicitation. Nor do they recognize that both the policy and practice actually in issue here grant the Respondent complete discretion to discriminatorily preclude—as it did here—union solicitation of protected messages while permitting frequent solicitation by civic and charitable groups.

We note additionally that our colleagues do not dispute that the message sought to be disseminated by the Union here is protected under the Act. That the Act protects such messages is fully consistent with the congressional intent to encourage free debate in labor disputes. See *Letter Carriers v. Austin*, supra. Our finding of unlawful conduct in this case is not based on the First Amendment, as our dissenting colleagues suggest, but rather is based on rights conferred by the Act. Thus, the fact that the *constitutional* guarantee of free expression was held inapplicable to access cases in *Hudgens v. NLRB*, 424 U.S. 507 (1976), as our colleagues point out, has no bearing on our finding of a violation in this case.

[11] We additionally take note of the Respondent's contention that, if the Board adopts the judge's finding of discriminatory treatment, the Union's access to the Respondent's premises must be subject to the same specific limitations as to the number of solicitors permitted and the like which the Respondent imposes on other groups. The relevant issue alleged and decided in this case is whether the Respondent unlawfully denied the Union access to its premises, not whether the Respondent may permit the Union access to its premises and lawfully subject it to certain limitations. Accordingly, we need not determine what, if any, reasonable limitations the Respondent may place on the Union's access to its premises.

property away from the Respondent's stores. The temporary injunction issued by the West Virginia Circuit Court was made permanent on December 19, 1988.[12] The Respondent's action in Belmont, Ohio Circuit Court was dismissed on March 7, 1991, on the ground that the Respondent's complaint was preempted by the National Labor Relations Act.[13]

In *Loehmann's Plaza*,[14] which issued after the judge's decision here, the Board held that once a complaint issues alleging, as in this case, the unlawful exclusion of employees or union representatives from the employer's property, any state court lawsuit concerning the question is preempted by the Board's proceedings.[15] Further, the continued pursuit of such a lawsuit following complaint issuance violates Section 8(a)(1) of the Act.

Applying the rule of *Loehmann's Plaza* to this case, we find that the Respondent violated Section 8(a)(1) by continuing to maintain its Ohio and West Virginia state court actions against the Union after the General Counsel issued a complaint alleging that the Respondent had unlawfully denied the Union access to its St. Clairsville and Wheeling facilities.[16] It is undisputed that the Respondent filed its state court complaints on September 8 and 9, 1988. It is further undisputed that the Union filed unfair labor practice charges on September 19 and 26, 1988, and the General Counsel issued a complaint on February 5, 1990. As we stated in *Loehmann's Plaza*, a respondent has an affirmative duty to take action to stay the state court proceedings following issuance of the Board complaint.[17] There is no evidence in this case that the Respondent took any action to stay the state court proceedings. We accordingly find that the Respondent violated Section 8(a)(1) by its continued maintenance of the state court lawsuits after the complaint in this proceeding issued on February 5, 1990.[18] *Great Scot, Inc.*, 309 NLRB at 549–550; *Davis Supermarkets*, 306 NLRB at 427, enfd. 2 F.3d at 1179, 1180.

AMENDED CONCLUSIONS OF LAW

1. Insert the following paragraph as paragraph 2 and renumber the subsequent paragraph.

''2. By prosecuting, after the issuance of a Board complaint, state court civil actions against the Union seeking to prohibit protected handbilling and picketing near the entrances to two of the Respondent's stores, the Respondent has violated Section 8(a)(1) of the Act.''

2. Delete paragraph 3.

AMENDED REMEDY

We shall order the Respondent to reimburse the Union for all legal expenses, plus interest as computed in *New Horizons for the Retarded*,[19] incurred after the February 5, 1990 issuance of the complaint in this proceeding in defense of the Respondent's Ohio and West Virginia state court lawsuits.[20]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Riesbeck Food Markets, Inc., St. Clairsville, Ohio, and Wheeling, West Virginia, its officers, agents, succes-

[12] On April 3, 1991, the Supreme Court of West Virginia found that state court jurisdiction was preempted by the Union's filing of unfair labor practice charges with the Board and reversed the circuit court's issuance of the injunction insofar as it enjoined the Union from peaceful picketing and handbilling on shopping center property.

[13] We grant the General Counsel's unopposed motion to reopen the record to reflect the dismissal of the Respondent's Ohio state court action.

[14] 305 NLRB 663 (1991).

[15] Member Browning agrees with the view Justice Blackmun set forth in his concurring opinion in *Sears, Roebuck & Co. v. San Diego County District of Carpenters*, 436 U.S. 180 (1978), that state court jurisdiction is preempted once the union files an unfair labor practice charge. In the absence of a Board majority for that position, however, Member Browning will apply the *Loehmann's Plaza* rule that the General Counsel's complaint triggers preemption.

[16] Under *Loehmann's Plaza*, the Respondent's filing of the lawsuits and maintenance of the lawsuits up until the time the General Counsel issued a complaint did not constitute a violation of the Act, because no evidence has been presented that the Respondent's purpose in pursuing the lawsuits prior to the time the General Counsel issued his complaint was other than to protect, or at least to have adjudicated, its property rights.

[17] If it takes this action within 7 days, the Board will not find a violation. Id. at 671.

[18] Member Devaney agrees that the Respondent's trespass injunction lawsuits violated Sec. 8(a)(1), but only for the following reasons. As set forth in his separate opinion in *Loehmann's Plaza*, supra, he would find that the test stated in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), is appropriate for determining whether lawsuits such as those at issue here violate the Act. Applying that test in this case, Member Devaney would find that it need not be shown that the lawsuits lacked a reasonable basis, because both lawsuits are over and the Respondent did not prevail. Therefore, for a violation to be found, all that need be shown is that the lawsuits had a retaliatory motive. See *Oakwood Hospital*, 305 NLRB 680, 682 (1991) (Member Devaney, dissenting in part); *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 (1990). Member Devaney would find such a motive here. The Respondent's lawsuits were to further its discriminatory policy and practice of excluding union solicitation of customers while permitting solicitation of customers by other organizations. The Board has found that the union's solicitation was protected by Sec. 7 and the Respondent's discriminatory prohibition of it violated Sec. 8(a)(1). The Respondent's trespass injunction lawsuits were simply another means for the Respondent discriminatorily to prevent the Union from engaging in protected conduct. Member Devaney would therefore find the lawsuits to be attempts to retaliate against the Union's protected activities. On that basis, he would find that the *Bill Johnson's* test was met and that the lawsuits violated Sec. 8(a)(1).

[19] 283 NLRB 1173 (1987).

[20] We find it unnecessary to order the Respondent to withdraw its lawsuits because both have been dismissed by the state courts on preemption grounds.

sors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

''(b) Prosecution, after the issuance of a Board complaint, of state court lawsuits seeking to prohibit the Union from engaging in protected picketing and handbilling near the customer entrance of its St. Clairsville, Ohio store, and from handbilling near the customer entrance to its Wheeling, West Virginia store.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraph.

''(b) Reimburse United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC for all legal expenses, plus interest as computed in *New Horizons for the Retarded*, supra, incurred after the February 5, 1990 issuance of the complaint in this proceeding in defense of the Respondent's state court lawsuits against the Union.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBERS STEPHENS AND COHEN, dissenting.

We agree with our colleagues in the majority that the Supreme Court's decision in *Lechmere v. NLRB*, 112 S.Ct. 841 (1992), did not eliminate what might be termed the ''discrimination'' exception to the rule of *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956); and we adhere to the Board's post-*Lechmere* decisions that so hold. E.g., *Great Scot, Inc.*, 309 NLRB 548 fn. 2 (1992). We disagree, however, that the particular facts established on the record in this case permit a finding of discrimination. For the reasons set out below, we would dismiss the complaint.

There are three pieces of evidence and one evidentiary gap that, considered together, we find determinative. First, the Respondent's detailed policy governing on-premises solicitation by outside groups (appendix B) contained a specific rule (no. 4) that absolutely prohibited ''Solicitation of or distribution to customers by any group or individual seeking to solicit Riesbeck's customers not to patronize Riesbeck.'' Second, the Union's picket signs and handbills all urged customers not to patronize Riesbeck. Third, the Respondent had allowed nonemployee union agents on its property to solicit employees in an organizational campaign, thereby demonstrating that the policy's general statement about enhancing ''business goodwill'' was not a cover for barring unions, including even those that respected the explicit prohibitions applicable to all groups and individuals.[1] Finally, there is no evidence that the Respondent had ever disparately applied its rule barring solicitations with ''do not patronize'' messages.[2] In short, Respondent permits *nonboycott* solicitations by nonunions and unions, and it forbids *boycott* solicitations by unions and nonunions. In our view, such a practice does not discriminate against union activity.

In the absence of discrimination, we find no basis for predicating an unfair labor practice on the Respondent's exclusion of the nonemployee union agents carrying out the Union's ''do not patronize'' campaign. Our colleagues rely on such cases as *Letter Carriers v. Austin*, 418 U.S. 264 (1974), and *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), for the proposition that Congress intended to foster, through our Act, ''freewheeling use of the written and spoken word'' (*Austin*, supra at 270) and to ''encourage free debate on issues dividing labor and management'' (*Linn*, supra at 62). We do not dispute that proposition, but we question its relevance here. In those cases, the issue before the Court was whether state libel laws could be used to penalize, by means of damage judgments, speech that was protected by Section 7 of the Act or its analogue in a Federal executive order. The Court decreed an accommodation with policies of the Act pursuant to which there could be no liability under state libel laws for speech in labor disputes if that speech did not amount to a reckless or knowing falsehood. *Austin*, supra at 281. The issue in the present case is whether the Employer can bar access to private property under its control to persons who are not its employees and who are engaged in expressing views protected by Section 7 of the Act. The Supreme Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976), foreclosed reliance on concepts stemming from First Amendment free-expression considerations;[3] and the Court in *Lechmere*, supra, as noted above, left standing the prohibition against discriminatory access policies, but otherwise applied a rule that turns on considerations other than the strength or importance of the Section 7 rights at issue.

We are not persuaded by our colleagues' assertion that the Respondent's policy is overly broad on its face

[1] We agree that this case would be much closer to *D'Alessandro's, Inc.*, 292 NLRB 81 (1988), if the Respondent had never allowed union agents to engage in solicitation on its property and had applied a policy of barring their entry for any purpose under its more general rule permitting only ''charitable'' organizations that ''enhanced'' its ''business goodwill.'' In *D'Alessandro's* the union handbillers were ejected on the ground that their presence was in violation of the owner's policy of excluding '''controversial' activities . . . that would make customers uncomfortable.'' Id. at 82. Notwithstanding this expressed policy, political candidates giving speeches addressing, inter alia, the right-to-work laws, were permitted on the property. Id.

[2] We take administrative notice of the fact that labor unions are not the only organizations in this country that seek to encourage consumer boycotts. The Respondent's rule 4 would, on its face, apply to any group that sought to injure the Respondent's business by the specific means of asking customers not to shop there.

[3] ''We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case like this.'' 424 U.S. at 521.

and that the Respondent is given wide discretion under that policy. There is no evidence that the policy, as actually interpreted and applied, operates to discriminate against union activity.[4]

Because we would find that the Respondent was not unlawfully interfering with a protected right in barring the access at issue in this case, we would further find that the state court actions enforcing the Respondent's property rights were not unlawful.[5] We would therefore dismiss the complaint.

[4] We recognize that a no-solicitation rule, directed at employees, may be unlawful on its face if it is overly broad. However, the allegation in this case is not that the rule is overly broad on its face, but rather that it has been interpreted against union activity. As discussed above, we believe that the rule does not discriminate on this basis.

[5] Member Stephens agrees with the majority that if the Respondent violated Sec. 8(a)(1) in barring access to the union picketers and handbillers, then the Respondent's continued prosecution of its lawsuits after issuance of the unfair labor practice complaint also violated Sec. 8(a)(1) under the holding of *Loehmann's Plaza*, 305 NLRB 663 (1991). Member Cohen finds it unnecessary to reach this issue and does not do so.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily prohibit representatives of United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC, from picketing and handbilling near the customer entrance of our store in St. Clairsville, Ohio, and from handbilling near the customer entrance of our store in Wheeling, West Virginia.

WE WILL NOT prosecute, after the issuance of a Board complaint, state court lawsuits seeking to prohibit the Union from engaging in protected picketing and handbilling near the customer entrance of our St. Clairsville, Ohio store, and from handbilling near the customer entrance of our Wheeling, West Virginia store.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Union, with interest, for all legal expenses incurred after the February 5, 1990 issuance of a complaint in this proceeding in defense of the state court lawsuits we brought against the Union.

RIESBECK FOOD MARKETS, INC.

APPENDIX B

Riesbeck Food Markets, Inc.

POLICY ON SOLICITATION OF AND DISTRIBUTION OF MATERIALS TO CUSTOMERS BY OUTSIDE GROUPS AND INDIVIDUALS ON RIESBECK PREMISES

Riesbeck Food Markets, Inc. follows a general policy of prohibiting any solicitation of or distribution of materials to Riesbeck's customers by outside groups and individuals on Riesbeck's premises. The basis of this policy is that Riesbeck's will allow no solicitation or distribution activity on it premises that holds any significant potential of harming Riesbeck's business. In that regard, it is our best judgment that a significant number of our customers do not wish to be approached or confronted in connection with any issue of controversy in the course of a trip to the supermarket, and will choose to patronize a competitor who is not subject to such solicitation and/or distribution activity if so confronted while on foot entering or leaving the supermarket. In particular, it is our judgment that a significant number of our customers do not wish to be confronted by any kind of picketing activity on Riesbeck's premises without regard to the message being conveyed by pickets.

Pursuant to Riesbeck's general policy, the following activity is absolutely prohibited on Riesbeck's premises:

1. Solicitation of or distribution to customers by any other commercial enterprise, including the handbilling of vehicles.
2. Solicitation of or distribution to customers by any political campaign of any kind, including school millage campaigns, etc.
3. Solicitation of or distribution to customers by any organization taking a public position on any significant issue over which there are differing opinions in the community (e.g., pro-choice or pro-life groups, product boycotters, etc.)
4. Solicitation of or distribution to customers by any group or individual seeking to solicit Riesbeck's customer not to patronize Riesbeck's

Any group or individual who seeks permission to conduct such activity will be denied access to Riesbeck's premises, and any group or individual discovered to be engaging in such activity without permission will be asked to leave Riesbeck's premises immediately.

Activities that promote Riesbeck's business. Limited access by certain solicitation of and distribution to customers by charitable organizations under controlled conditions enhances Riesbeck's business goodwill in the communities it serves. Therefore, solicitation of and distribution to customers may be permitted under the following conditions:

a. The organization must be charitable in nature and must be either locally based or the local affiliate of a larger organization.

b. The organization must not take public positions on any significant issue over which there are differing opinions in the community.

c. The organization must not be directly involved in political issues.

d. The number of solicitors/distributors must be limited to two at any one time.

e. The length of time that the solicitors/distributors are permitted access to our premises is limited to two consecutive days.

f. The location of the solicitors/distributors must be restricted away from the immediate vicinity of the store entrance.

g. The organization must not solicit customers not to patronize Riesbeck's or purchase goods sold at Riesbeck's.

h. The organization must not utilize placards.

i. The solicitors/distributors must not liter [sic], play radios, etc., at a loud volume, or otherwise disrupt store operations in any way.

Notwithstanding the foregoing, Riesbeck's retains discretion to deny access to its premises to any individual or group whose activity does not, in Riesbeck's judgment, promote Riesbeck's business.

Application for access. An organization or individual desiring access must certify in advance that it will satisfy each of the conditions listed above by the signature of an officer or adult advisor (if applicable).

Signature: _____

Allen Binstock, Esq., for the General Counsel.
J. Michael Kota, Esq. and *Julie Ashworth Glover, Esq.*, of Columbus, Ohio, for the Respondent.
James R. Reehl, Esq. and *Daniel W. Dickinson Jr., Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on April 24, 1990, in St. Clairsville, Ohio. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by refusing to permit picketing and handbilling on behalf of the Charging Party Union (the Union) at the customer entrances of its store in St. Clairsville, Ohio, and handbilling at the customer entrances of its store in Wheeling, West Virginia, and, thereafter, filing suits in state courts to cause the removal of the pickets and handbillers. The Respondent filed an answer denying the essential allegations in the complaint. The parties have filed briefs which I have read and considered.

Based on the briefs, the testimony of the witnesses, and my observation of their demeanor, as well as the documentary evidence and the entire record here, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, is engaged in the operation of retail stores in St. Clairsville, Ohio, and Wheeling, West Virginia. In the course and conduct of its business, Respondent derives gross revenues of over $500,000 and annually purchases and receives, at its St. Clairsville and Wheeling facilities products, goods, and materials valued in excess of $50,000 directly from outside the States in which these facilities are located. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. The Union's activity and Respondent's reaction

On September 7, 1988, the Union initiated informational picketing and handbilling outside the customer entrances of the Respondent's stores in St. Clairsville, Ohio, and Wheeling, West Virginia. None of the pickets or handbillers were employees of Respondent and the Union had previously notified Respondent that it disclaimed any interest in seeking to represent the employees at either store. The activity was conducted peacefully and without blocking ingress or egress to customers, employees, suppliers, or other individuals. The picket signs stated that Respondent does not employ members of, or have a contract with, the Union, and asked customers not to patronize Respondent. The handbills contained essentially the same message.

Respondent's St. Clairsville store is a ''free standing'' store located on premises owned by Respondent. Its Wheeling store is located in the Elm Grove Shopping Plaza on premises leased by Respondent.

On September 8, 1988, Respondent's managers asked the pickets and handbillers to leave the premises. They refused. The Respondent thereafter filed actions in the Ohio and West Virginia state courts seeking injunctive relief against the picketing and handbilling. On September 9, the courts in each State issued temporary restraining orders against the Union, prohibiting the picketing and handbilling outside Respondent's customer entrances and limiting such activity on public property outside the shopping center and Respondent's premises. The West Virginia Circuit Court order was made permanent on December 19, 1988; the Belmont County, Ohio County court issued a preliminary injunction, but a motion by Respondent for a permanent injunction remains pending. The Union thereafter conducted its picketing and handbilling on public property outside the driveway entrances into the shopping center and Respondent's premises. That activity continued until December 6, 1988, when it ceased.

On September 26, 1988, the Union filed the unfair labor practice charges in this case. It took the position in the state court actions that the suits should be dismissed because state court jurisdiction was preempted by that of the Labor Board. The Supreme Court of West Virginia has accepted the

Union's appeal of the permanent injunction and the matter is currently pending before that court.

2. The physical layout of Respondent's stores

Respondent's Wheeling facility is one of two major retail enterprises in the Elm Grove Shopping Plaza; there are other smaller facilities in the shopping center bordered by a large parking area containing 435 spaces, of which 200 front Respondent's store.

The plaza itself is in the shape of a long, low right triangle, bordered along its base by Route 40, a four-lane highway. To the east, along the triangle's short leg, is Pontiac Road, a two-lane street with an unposted 25-mile-per-hour speed limit. To the north, along the triangle's hypotenuse, lies Little Wheeling Creek. The two customer doors of Respondent's store face north onto the larger portion of the parking lot. One store entrance is approximately 80 yards from the southern Pontiac Road entrance to the shopping center. The second is approximately 25 to 30 yards from that street entrance. At the far western tip of the property, where the Shilling Bridge crosses the Little Wheeling Creek and intersects Route 40, an access road through an undeveloped portion of the property exclusively services the plaza from the west. This entrance to the plaza is about 1600 feet from Respondent's store which cannot be seen from the street entrance. There is a stop sign at the intersection of Shilling Bridge and the access road where the speed limit is 25 miles per hour. There are no entrances directly into the plaza from Route 40.

The Respondent's St. Clairsville store is located on premises owned by it and which included, at the time of the picketing, a Fotomat outlet and an automatic teller machine. The latter is still located at the site. The premises are located on U.S. Route 40, a two-lane road with a 35-mile-per-hour speed limit. There is a driveway entrance to the parking lot at the eastern end of the property and a driveway exit near the west end. There are no traffic signals or turning lanes at either of these sites. Access to the lot is solely from Route 40 as there are no other access roads. The location where the Union was ordered to conduct its activity on public property outside the premises is approximately 60 yards from the customer doors of the Respondent's store.

3. The Respondent's solicitation policy

In the past, Respondent has allowed charitable, civic, and other organizations to solicit on its property near the customer entrances to its Wheeling store at the Elm Grove Shopping Plaza as well as its St. Clairsville store. In 1988 the following groups were allowed to solicit in front of the Wheeling store for varied purposes: volunteer fire departments were permitted to conduct a bake sale and a candy sale; various youth sports groups and Easter Seals were permitted to solicit for tags; the V.F.W. was permitted to conduct poppy sales; and the Salvation Army was permitted to conduct its bell-ringing collection campaign throughout the month of December. The list submitted in evidence included 23 different days of such activity in 1988, excluding the month-long Salvation Army activity. The same groups were permitted to solicit in 1989, presumably for the same period of time. And the list of groups and activity would be ''considerably longer'' at the St. Clairsville store, according to Richard Riesbeck, the president of Respondent. At the latter store the list would include cheerleader and school band groups.

Respondent submitted in evidence a written policy statement on solicitation and distribution of materials by outside groups and individuals on its premises. That policy generally prohibits all solicitation and distribution directed to customers but permits such activity if it is deemed to enhance the Respondent's good will. It also prohibits groups from seeking to solicit Respondent's customers not to patronize it. Respondent did permit the Union to engage in organizational solicitation of its employees on the premises of its Wheeling store in early 1988.

B. *Discussion and Analysis*

1. The prohibition violation

The General Counsel contends that Respondent's prohibition against the Union's informational picketing and handbilling on its premises was discriminatory because it permitted numerous other outside groups to solicit and distribute on its premises for charitable and civic purposes. Such discrimination, he asserts, is unlawful without regard to the accommodation and balancing of property rights and Section 7 rights normally required in this type of case under *Jean Country*, 291 NLRB 11 (1988), and its progeny. The Respondent counters that it did not discriminate because the activity permitted on its premises was different from that which the Union sought to undertake.

If I were writing on a clean slate, I might agree that do-not-patronize consumer-oriented activity, regardless of the entity advancing it, is not similar to charitable or civic activities which this and other retailers permit on their property to enhance good will. However, I am not. The Board has specifically considered the issue in two recent cases and has ruled, in a way which I believe leaves no room for realistically distinguishing this case, that such do-not-patronize consumer appeals by unions are the same as or similar to charitable or civic solicitation, and, therefore, banning the former while permitting the latter is unlawful disparate treatment. *D'Alessandro's, Inc*., 292 NLRB 81 (1988), and *Ordman's Park & Shop*, 292 NLRB 953 (1989).

In *D'Alessandro's*, the employer prohibited a union which had disavowed any organizational object, from handbilling at the customer doors of its grocery store. The union's message was that customers should not shop at the employer's store and patronize instead specifically named unionized stores. The Board found a violation on a disparate treatment theory because the employer had permitted, on its premises, a wide range of commercial and other activity unrelated to the operation of the store. This activity included handbilling parked cars, the sale of various items at the customer doors, the display of boats and vehicles in the parking lot, and even a press conference for political candidates. The Board specifically found that the banned do-not-patronize-because-the-store-is-nonunion message was protected concerted activity under Section 7 of the Act and inferentially found that this activity was the equivalent of the other activities listed above which were permitted.

In *Ordman's Park*, supra, the union picketed and handbilled with a similar do-not-patronize message; here, however, the union was protesting that the new owner of the

store it was picketing did not hire the union members employed by its predecessor. The store owner and the property owner lessors effectively banned the picketing and handbilling from areas adjacent to the store. Here again, the Board found a violation based on disparate treatment because the very sidewalks and store entrances from which the union was ousted were utilized freely by charitable, civic, and other organizations, including cheerleaders selling baked goods and Lions Club representatives selling candy. Carwashes sponsored by other groups were also held on the parking lot.

Having found unlawful disparate treatment in each case, the Board found it unnecessary to engage in the accomodation analysis of the relative strength of property and Section 7 rights under the principles of *Jean Country*, supra.[1]

I cannot see any legally significant differences between this case and *D'Alessandro's*, supra, and *Ordman's Park*, supra. In all three cases, nonemployee union pickets engaged in do-not patronize activity with no organizational or bargaining objectives. In all three cases, the employer-property owner-lessee opened his property to solicitation and other activity by outside groups. In all three cases, the union was banned from engaging in its activity. Although there is obviously a point at which the permitted activity is so limited that a disparate treatment analysis cannot be sustained (see *Hammary Mfg. Corp.*, 265 NLRB 57 (1982)), the evidence of such permitted activity here, as in the other two cases cited above, more than meets this threshold level. Thus, the Respondent here permitted all kinds of civic and charitable solicitation for a total of almost 2 months a year. If anything there was more of this type of activity here than in *D'Alessandro's* and *Ordman's Park*. In these circumstances, I am constrained to conclude that *D'Alessandro's* and *Ordman's Park* require a finding, in this case, that Respondent's ban against the Union's do-not-patronize message in the face of its permitting significant charitable, civic, and other solicitation on its premises was unlawful.[2]

In two footnotes to its lengthy brief, Respondent attempts to distinguish the adverse precedent. It attempts to distinguish *D'Alessandro's* on the ground that, although both cases involved a policy which prohibited controversial activities, the employer in *D'Alessandro's* permitted a political press conference on a controversial issue whereas Respondent adhered to its policy. I doubt that *D'Alessandro's* turned on this point. First of all, as I have indicated above, de minimus or isolated toleration of nonunion activity will not ordinarily support a violation. In *D'Alessandro's*, the Board contrasted the employer's prohibition of union activities with the grant of ''virtually unlimited use'' of its property to outsiders for ''sales, solicitations, and distributions.'' As further evidence of disparate treatment, the Board went on to unmask an alleged distinction based on controversial activities. It was in this context that the Board discussed the political press conference. In any event, even if such evidence were not present, it seems to me that the result would have been the same. Any attempt to distinguish peaceful and protected union activities from other solicitations on the ground that the former is controversial is itself discriminatory because the implication is that all union activity is controversial. Moreover, this approach injects a subjective element to the equation which is based on the content of the union's message as a union.

Respondent's attempt to distinguish *Ordman's Park* is likewise ineffective. The Respondent states that the Section 7 right in that case was different from that in this case because the union was protesting the employer's refusal to hire the employees of a predecessor. However, under the disparate treatment rationale of the Board, the origin of the protest and the degree of the Section 7 right is irrelevant. The Section 7 right in the two cases is essentially the same—the right of a union, through nonemployees with no organizational objectives, to protest the nonunion status or policy of the employer. The message was also the same. Customers should not patronize the employer because of its antiunion position.

In sum, under applicable Board precedent, I find that Respondent's ban on union consumer appeals at both locations was discriminatory and thus violative of Section 8(a)(1) of the Act. In view of this disposition of the case, like the Board in *D'Alessandro's* and *Ordman's Park*, I need not reach the accomodation theory argument advanced by the General Counsel under the *Jean Country* case.

2. The state court litigation violation

The General Counsel contends that the Respondent's filing of lawsuits in which it sought court expulsion of the pickets and handbillers from its premises was independently violative of the Act, in reliance on *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).[3] In *Bill Johnson's* the Supreme Court confirmed that it is an unfair labor practice for an employer or union to file and prosecute a baseless lawsuit with the intent to retaliate against employees exercising their rights under the Labor Act. The Court indicated that when confronted with an allegation that the filing and prosecution of a lawsuit violates the Act, the Board must first determine whether the suit has a ''reasonable basis.'' If the suit is not deemed to have had a reasonable basis, the Board must then determine whether the suit was filed with a retaliatory motive. If the suit is found to have a reasonable basis, the Board may not enjoin the suit but must stay its own proceeding until the lawsuit has been concluded (461 U.S. at 747).

The General Counsel asserts that the Respondent's state court lawsuits herein were unlawful because they were retaliatory and they lacked a reasonable basis since they were preempted once the Union invoked the processes of the Board.

The Respondent counters that its lawsuits were not unlawful, in reliance on the Board's decision in *Giant Food Stores*, 295 NLRB 330 (1989), motion for reconsideration denied

[1] It might well be that, under the accomodation theory of *Jean Country*, discriminatory treatment of a union might tip the balance between Sec. 7 rights and property rights in favor of the union—at least in some circumstances. The Board, however, has not taken this approach in the cited cases. But see *Wegman's Food Markets*, 300 NLRB 868 (1990), enfd. 957 F.d 912 (D.C. Cir. 1990).

[2] Both Respondent's rule and its practice made the crucial distinction between do-not-patronize and other solicitation so it does not matter that Respondent substantially followed its rule when it prohibited the union activity.

[3] Actually, the General Counsel urges a violation in the continuation of the lawsuits after the filing of the unfair labor practices charges here because at that point, in his view, the lawsuits were preempted.

298 NLRB 410 (1990). In *Giant* the Board applied the analytical framework established in *Bill Johnson's*. It found that the evidence in that case—which was similar to that in this case—was insufficient to establish that the employer's maintenance of a lawsuit to enjoin what was found to be lawful protected picketing on the employer's premises after the union filed a charge ''lacked a reasonable basis.'' The Board held that because ''the state court was obligated to consider the preemption claim once it was raised by'' the union therein, ''it cannot be said that the litigation of that issue or the subsequent appeal of the state court's resolution of that claim, without more, lacked a reasonable basis.'' Thus, the Board concluded that *Bill Johnson's* required it to stay its hand pending completion of the state court proceedings and it dismissed this aspect of the complaint, retaining jurisdiction for further consideration after the conclusion of the state court action.

The General Counsel meets the *Giant* decision head on by asserting that the Board therein erroneously applied *Bill Johnson's* as exemplified by its earlier decision in *American Pacific Concrete Pipe Co*., 292 NLRB 1261 (1989). In *American Pacific* the Board found *Bill Johnson's* to be inapplicable where the employer's lawsuit was preempted. In that case the General Counsel had pursued a backpay claim on behalf of an employee who entered into a private settlement agreement with the employer. The employer sued the employee because he continued to press his backpay claim before the Board notwithstanding the settlement. The General Counsel alleged that the private lawsuit was unlawful. Citing footnote 5 of *Bill Johnson's*, the Board observed that the Supreme Court's reasonable basis discussion did not apply to preempted lawsuits and thus it went on to consider the issue of retaliatory motivation and, finding such motivation in the case before it, also found a violation.

Although *American Pacific* was issued by the Board before its decision in *Giant*, the Board did not discuss *American Pacific* in *Giant*. Nor did it discuss it in its decision on motion for reconsideration after being presented with the General Counsel's essential argument that preempted lawsuits are baseless. Even though the General Counsel's motion for reconsideration was denied on procedural grounds, I must accept the Board's decision in *Giant* as controlling. In *Giant* the Board made it clear that, at least in a situation where the employer is seeking to enforce its property rights against an alleged trespass, the fact that a state court proceeding may ultimately be preempted is insufficient to support a finding that there is not a reasonable basis for the suit. As Chairman Stephens points out in footnote 13 of *Giant*, the Supreme Court's decision in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978)—the lead case on preemption of trespass actions—seems to support the view that the filing of a state court trespass action cannot be found to have lacked a reasonable basis. Usually in these types of cases there is a technical trespass. At the very least, as Chairman Stephens further notes, the Court's *Sears* decision does not answer the question of when, if ever, preemption applies where a charge has been filed—a situation not presented in *Sears* because a charge had not been filed in that case. Finally, contrary to General Counsel's contention, it is not imperative to make the filing or maintenance of a trespass action, in the face of a pending charge or complaint, an unfair labor practice in order to protect the Board's jurisdiction. The Board's processes are adequately protected by virtue of its primary jurisdiction over the unfair labor practice proceeding itself and by the supremacy of its ultimate resolution of the merits over a contrary state court decision based on a trespass theory. Furthermore, if the Board feels, in a particular case, that its jurisdiction is being infringed on, it may independently authorize a lawsuit to enjoin state court proceedings under *NLRB v. Nash-Finch Co*., 404 U.S. 138, 144 (1971).

In any event, even assuming that the state court lawsuits were dismissed and it could be determined that they lacked a reasonable basis, I do not believe that the filing of the state court actions in this case were undertaken for a retaliatory purpose. Respondent filed and maintained the lawsuits in good faith in an attempt to preserve its position—the status quo—pending the outcome of Board proceedings. Moreover, aside from the mere filing and maintenance of the lawsuits, the General Counsel cites no other evidence of retaliatory motive. None exists on this record. Indeed, the evidence in this case shows that Respondent permitted the Union to solicit employees on its property several months before its prohibition against the instant activity when the issue was organization of the Respondent's employees. The Respondent's conduct is thus a far cry from that of the employer in *American Pacific* or other cases in which the Board has found a retaliatory motive. See *Phoenix Newspapers*, 294 NLRB 47 (1989); *H. W. Barss Co*., 296 NLRB 1286 (1989); compare *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 823 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1985), affirming on this issue 271 NLRB 201, 208 (1984).

In these circumstances, I do not find that Respondent's lawsuits, aimed at enjoining technical trespasses which were nevertheless protected by the Labor Act, were independently unlawful. They were not undertaken without a reasonable basis and they were not undertaken for a retaliatory motive. This aspect of the complaint will therefore be dismissed.[4]

CONCLUSIONS OF LAW

1. By discriminatorily prohibiting representatives of the Union from picketing and handbilling near the customer entrances to its store in St. Clairsville, Ohio, and from handbilling near the customer entrances to its store in Wheeling, West Virginia, Respondent has violated Section 8(a)(1) of the Act.

2. The violations described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[4] If and when my findings of a violation for prohibiting union activity at the customer entrances to the two stores are upheld and finalized, the state court suits must be dismissed because the Board's decision takes precedence. Should the Union wish to resume picketing and handbilling in accordance with the Board's decision it could urge dismissal on this basis as well as preemption. The Board could also, if it chooses, intervene under *Nash-Finch*, supra, urging dismissal on the same grounds.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Riesbeck Food Markets, Inc., St. Clairsville, Ohio, and Wheeling, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting representatives of United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC from picketing and handbilling near the customer entrances to its store in St. Clairsville, Ohio, and from handbilling near the customer entrances to its store in Wheeling, West Virginia.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its stores in St. Clairsville, Ohio, and Wheeling, West Virginia, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily prohibit representatives of United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC from picketing and handbilling near the customer entrances to our store in St. Clairsville, Ohio, and from handbilling near the customer entrances to our store in Wheeling, West Virginia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

RIESBECK FOOD MARKETS, INC.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''